EX PARTE OR LATE FILED

Tribal Voice
600 17th Street, Suite 2500 South
Denver, CO 80202

August 8, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

> Ex Parte Presentation
> America Online, Inc. and Time Warner, Inc. Applications for Transfer of Control
> CS Docket No. 00-30 ,

Dear Ms. Salas:

Pursuant to section 1.1206(b)(1) of the Commission's rules, I am attaching
two copies of a letter on instant messaging, responding to issues raised at the July 27
en banc hearing in the above-captioned proceeding. Commission personnel listed
below are being served with a copy of this letter.

A copy of the letter and the attachment is also being provided to the
International Transcription Service, as required by Public Notice DA 00-689.

Sincerely,

Ross Bagully
President and CEO

cc: Hon. William E. Kennard
      Hon. Susan Ness
      Hon. Michael Powell
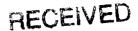   Hon. Harold Furchtgott-Roth
      Hon. Gloria Tristani
      Ms. Deborah Lathen, CSB
      Ms. Royce Dickens, CSB
      Ms. Linda Senecal, CSB
      Mr. James Bird, OGC

No. of Copies rec'd __O+1__
List A B C D E

August 8, 2000

The Honorable William Kennard
Chairman, Federal Communications Commission
445 Twelfth Street, S.W., Room 8B 201
Washington, D.C. 20554

Dear Chairman Kennard:

On behalf of all the companies and community groups that have expressed concern about the potential of a closed Instant Messaging market, I want to thank you again for the opportunity to appear before you and your fellow Commissioners at the *en banc* hearing on the proposed merger of AOL and Time-Warner. I agree with Ms. Dyson's comment that holding the hearing greatly helped the public debate and probably moved AOL and Time Warner to take public positions that, without such review, they might not have taken.

In the last panel, Mr. Schuler made several comments to which I did not have an opportunity to respond. I wanted to provide you with a few quick facts on several topics that he and other representatives of AOL and Time Warner raised. Before discussing the specific points, however, I would note that on July 21, 2000 we filed a White Paper, co-authored by 17 companies, analyzing AOL's submissions to the FCC and the IETF. As the paper notes, AOL/Time-Warner's defense of its blocking interoperability boils down to two points: that it is working with the IETF and that blocking is necessary to protect their users' privacy and security. The White Paper details the flaws in those arguments. In its presentations and answers at the hearing, AOL/Time-Warner did not dispute most of the facts set White Paper but, nonetheless, continued to justify its behavior based on similar arguments. As discussed below, these arguments also do not justify the continued blocking of communications to its users. Moreover, their testimony raises significant concerns as to when, if ever, consumers will enjoy the kind of open, interoperable communications that exists with telephony and e-mail.

1. Time Needed to Create Safe, Secure Interoperability.

In my opening comments I noted that in July of 1999 Mr. Schuler wrote the IETF that AOL was "fast tracking" its efforts to achieve interoperability. Yet in June of this year Mr. Schuler wrote in USA Today that "spending the time now to get [interoperability] right is far more desirable than fast-tracking any proposal that puts consumers at risk." These conflicting statements raise the obvious question as to what is AOL's real position here and how long will it take to achieve interoperability?

While Mr. Schuler sought to avoid the question, fortunately Commissioner Tristani pushed to make him answer. The answer of a <u>minimum</u> of 12 months is remarkable. The idea that it would take a minimum of 24 months from the time AOL committed to fast-tracking a solution is a troubling indictment of its real commitment to interoperability.

As AOL Chairman and CEO Steve Case said in the context of the cable access debate, if the parties want to provide a technical solution, they can do so "quickly and inexpensively." A minimum of 24 months is neither quick nor acceptable.

2. The IETF Process

Mr. Case implied that AOL was the only company to provide a response to the IETF. Actually, there were 10 responses to the call for protocols. Further, as noted in the White Paper published by 17 companies involved with Instant Messaging, AOL did not provide an interoperability protocol, as called for by the IETF. Rather, AOL simply provided a restatement of the problem and proposed a high level architectural approach. I would note that the IETF is currently evaluating three proposals, but is not considering the proposal submitted by AOL, as it did not provide a protocol.[1]

3. Privacy and Security and Protection Against Spam

Mr. Schuler made a big point of comparing how an AOL user can seek assistance in the event of Spam to how a Tribal Voice user can seek assistance. Presumably, Mr. Schuler wished to cast doubt on how competitors are addressing privacy and security issues. Not only did he entirely miss the mark with regard to Tribal Voice's commitment to privacy and security, he demonstrated once again his and AOL's willingness to distort the issue, sacrificing reality in the interests of theater in an FCC hearing room.

First, Mr. Schuler once again failed to establish any link between interoperability and a diminishment in the privacy and security protections provided to AOL's users. The discussion of how different companies protect their users missed a critical point. Under the current method by which Tribal Voice users were able to interoperate with AOL users (until AOL blocked such communications), the AOL users would not lose the ability to avail themselves of AOL's techniques for addressing an unwanted communication. Consistent with my testimony, even under Mr. Schuler's example, interoperability does not reduce an AOL user's ability to eliminate Spam or any other kind of abuse. AOL continues to be able to offer its users any form of protection it wants.

Second, it appears that Mr. Schuler had confused AOL's ISP service with AOL's IM service in his attempt to compare AIM and Tribal Voice user support. Our review of all information available to AIM users indicates that AIM provides user recourse against abuse that differs dramatically from the process he described to you at the hearing. AIM

---

[1] "AOL out of messaging standard bake-off instant", by Carolyn Duffy Marsan, Network World, 08/07/00 ("The Internet Engineering Task Force has zeroed in on three technical proposals for creating an instant messaging standard, but the finalists do not include market leader AOL. The three proposals - developed by Cisco, Microsoft, Fujitsu and other companies - were selected from a field of 10. AOL's last-minute submission was a general framework for instant messaging interoperability rather than a full-fledged protocol, so it was not chosen for further consideration.")

offers a 'Warn' button that helps users send warning messages to unwanted communicators and gradually decrease their level of access. However, AIM offers users no specific contact point for abuse issues, instead advising users that these matters are entirely on their shoulders. As set forth in AOL's own materials:

> "No one patrols the Internet to make sure people remain polite or decent. If someone else using the AOL Instant Messenger (SM) service sends you annoying or offensive messages, you have two ways to respond. You can issue a warning to the person or you can block the person."

> Source: AOL Instant Messenger Help – How Warnings Work

> "With AIM, you control your level of privacy"

> Source: AOL Instant Messenger Overview – Buddy Privacy

Outside of a generic 'report a bug' system that does not appear to be set up for abuse issues, the only AIM users who are clearly given the opportunity to contact AOL about IM abuse are those who also pay for AOL's ISP service, which offers customer support options, including a 'Notify AOL' button. However, AIM users who do not pay for AOL's ISP's are apparently not offered this level of support.

Tribal Voice users are clearly instructed as to their rights and the tools that they may employ to reduce abuse, and they are provided with a direct link to Tribal Voice's customer support team via e-mail. The User Relations staff of Tribal Voice takes every reported case of abuse very seriously. They make every effort to assist users with resolving reported cases of abuse.

As noted in the White Paper, there are a number of companies that have privacy and security features superior to what AOL offers. But the point here is not to draw conclusions about which company has the best over-all package. The point is to create a market in which consumers themselves can make the selection based on the package they prefer and not on the basis of which is the only system that allows one to communicate efficiently with 90% of the market.

In sum, Mr. Schuler's comments reinforce our perception that AOL is using "privacy and security" in this debate much as the old Bell System used the idea of "network security" in the FCC debates in the 1970's; as a way of preventing competition rather than as a serious effort to raise and solve a problem.

4. Licensing vs. Open Standards

One of our concerns throughout this debate is the question of whether AOL truly favors interoperability based on open standards or whether it only wants interoperability based on licensing of proprietary software that it unilaterally controls. Cause for this concern was on display again as Mr. Case sought to portray his company's licensing policy of its

proprietary software as an act of generosity that should be sufficient to alleviate any public policy issues.

As Commissioner Powell noted, however, free licensing is not philanthropy; it is a common practice in the Internet market to enable one to create a beneficial network effect. It is important to understand that licensing of AOL's proprietary software does not result in true interoperability across diverse systems and mediums. Without a set of protocols developed in an open standards environment, which can be adopted widely by IM providers and equipment and applications developers, many features will continue to be very limited, such as the disabling of some of the extended features of IM, including in many cases, attachments. This is indeed a high price to pay, and is merely one example of why an open standards approach is the only answer. If AOL succeeds in creating a world, in Mr. Case's words, "in which everyone who wants to communicate with AOL members would use software 'licensed or approved by us,'" it will be a world in which competition and innovation will find it difficult to take root and grow.

As I'm sure, this Commission recognizes, IM is a platform that facilitates a variety of communications types. Many hybrid products will emerge, just as myriad products and services have emerged from the telephone platform or the e-mail platform. These kinds of innovations require many different kinds of software with many people approaching development in their own ways.

Given Mr. Case's efforts to claim that AOL's licensing is an act of generosity, it is no wonder that observers described AOL as "the wolf in shepherd's clothing when it comes to instant messaging."[2] It is in the public interest that no one company be allowed to own or control the development of standards, nor to act as gatekeeper to the development of innovations. That is what is at stake in this debate.

5. What we are doing to create interoperability

Commissioner Powell's question about what others have done and are doing to create interoperability is an important one and deserves a more complete response than the one I was able to provide last week.

Over the past year, there are have a number of different activities in terms of how interoperability could be achieved. At first it was hoped that AOL would simply allow others to exchange messages with AIM users, since they published a protocol (TOC) that would facilitate that result. When AOL blocked such efforts but promised to fast track its work with the IETF, it was hoped that that process might quickly result in interoperability. As that process did not move quickly, a number of companies started moving toward bi-lateral (that is, one company to one company) interoperability protocols. As noted in my answer, a number of companies are now interoperable with each other on a one to one, or even a one to two to three basis. Of course, from a business perspective, interoperability with a company with less than _% of the market

---

[2] Mike Tarsala, *CBSMarketWatch*, "AOL: Instant messaging wolf?," August 2, 2000

(which the second largest IM service has)[3] is meaningless in comparison to interoperability with a company with 90% of the market. Adding up all the competitors cannot equal a meaningful market share in this environment.

Late this spring a number of companies who believe that interoperability for IM is just as important as it has been for telephones and e-mail came together to pursue a way to achieve multi-lateral functional interoperability in the near term. These companies are as concerned about protecting their customers' privacy and security as is AOL. In a matter of only a few months, these discussions led to the introduction last week of the coalition called IMUnified. This effort, which is open to any company that is committed to open standards based IM interoperability, will initially result in safe and secure Instant Messaging across a number of different providers, on a multi-lateral basis, within the next several months. In short, we will deliver the functional interoperability among ourselves that is clearly in the public interest. But without 90% of the market participating, the Instant Messaging market will not deliver to consumers the kind of innovations and choice that an open competitive market will deliver.

In sum, two facts appear from the record. First, it is clearly in the public interest that instant messaging enjoy the same kind of interoperability available with telephony and e-mail. Second, AOL is doing what it can to put that day back as much as it can and the merger with Time-Warner has the potential to push that day even more. You have the power to tell Mr. Case to tear down the wall. We urge you to use that power.

Sincerely,

Ross Bagully
CEO, Tribal Voice

---

[3] AOL made much of the fact that Microsoft has gained 18 million users in the last 9 months. By way of comparison, according to AOL's own figures, users of AOL's products increase by 19 million (from 112 million to 132 million in just the second quarter of 2000. This is an obvious example of the network effects playing out in the market.